STATE OF MICHIGAN

COURT OF APPEALS

WAYNE A. GOODFALLOW, Plaintiff-Appellant,	UNPUBLISHED April 12, 2011
v	No. 296155 Grand Traverse Circuit Court
GLENNWOOD CUSTOM BUILDERS, INC., Defendant-Appellee,	LC No. 09-027168-NO
and BAESCH BUILDING SERVICES, INC., Defendant.	

Before: O'CONNELL, P.J., and K.F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's decision to grant summary disposition in favor of defendant Glennwood Custom Builders, Inc., pursuant to MCR 2.116(C)(10).[1] The trial court determined that there were no genuine factual issues regarding necessary elements of the common work area doctrine. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In 2006, defendant was the general contractor on a residential construction project. Baesch Building Services, Inc. was a subcontractor on the project. Plaintiff worked with Baesch's work crew on rough carpentry for the project. On October 16, 2006, plaintiff was directed to install three upper-story windows with two other Baesch crew workers. Instead of using the commercially manufactured scaffolding or ladder jacks that were available on site, the workers constructed their own scaffolding. Plaintiff's supervisor was unaware that the workers were using hand-built scaffolding. Approximately 15 minutes after plaintiff and his co-worker began using the hand-built scaffolding, it collapsed. Plaintiff fell nearly 15 feet to the ground

[1] Defendant Baesch Building Services, Inc. is not a party to the appeal.

below, causing injuries to his hip, back, and neck. After the incident, the scaffolding was torn down.

Plaintiff admitted in his deposition that when he fell, he and his two co-workers were the only people working on that side of the house. The two co-workers testified that they intended to tear down the hand-built scaffolding after they installed the windows. There was evidence that a different subcontractor was on site at the time of the incident and would have eventually installed stone on the exterior of the wall where plaintiff fell. Further testimony established that each subcontractor provided and used its own equipment. There was no evidence introduced that any subcontractor used another's equipment, or intended to use the hand-built scaffolding.

Defendant did not have a representative on site when the incident occurred and was not made aware of the incident until several days later. There was no history of hand-built scaffolding being used on the worksite prior to this incident. In contrast, ladder jacks and commercially manufactured scaffolding were used on the worksite and were available and readily accessible to the subcontractors.

Defendant moved for summary disposition. At the conclusion of a hearing on the motion, the trial court found that plaintiff had failed to establish a question of fact as to three of the required elements of the common work area doctrine. Consequently, the trial court granted summary disposition in favor of defendant and dismissed plaintiff's claims. This appeal followed.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

III. COMMON WORK AREA DOCTRINE

In Michigan, general contractors are usually not liable for injuries that result from the negligent conduct of independent subcontractors or their employees. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 55-56; 684 NW2d 320 (2004). However, the common work area doctrine is an exception to this rule. See *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29; 323 NW2d 270 (1982). A general contractor may be held liable for the negligence of the employees of independent subcontractors when the four-part test of the common work area doctrine is satisfied. *Ormsby*, 471 Mich at 56. The common work area doctrine requires a plaintiff to show that "(1) the defendant, either the property owner or the general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a

significant number of workmen (4) in a common work area." *Id*. at 54. Further, failure to satisfy any one of the elements is fatal to the claim. *Id*. at 59.

Plaintiff first argues that the trial court erred in concluding that there was no evidence to create a factual issue on the first element of the common work area test. The trial court found that the facts most favorable to plaintiff indicated that the scaffolding was up for a very short time before the accident. The record supports the trial court's finding. The evidence demonstrated that the hand-built scaffolding was used for approximately 15 minutes before plaintiff was injured, and that plaintiff's supervisor was not aware it was being used at that time. Defendant was not on site at the time of the incident and neither of its representatives had ever seen the hand-built scaffolding. Plaintiff acknowledges these facts, but nevertheless argues that defendant's failure to institute a safety policy, its absence from the worksite, and its ignorance of its responsibility for safety constitutes a failure to take reasonable steps within its supervisory and coordinating authority. We disagree.

Plaintiff cites no authority for the assertion that a failure to institute a safety policy satisfies the first element of the common work area doctrine. An appellant may not merely announce a position and then leave it to this Court to discover and rationalize the basis for the claims. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). To the extent plaintiff invites us to extend the breadth of the common work area doctrine in this case, we decline the invitation.

We also reject plaintiff's argument that defendant's absence from the worksite constitutes sufficient evidence that defendant failed to take reasonable steps to guard against readily observable danger. Given the limited time the scaffolding was in place before plaintiff's injury, and the facts that the scaffolding was out of sight of all other workers and had been constructed without direction from a supervisor, the trial court properly determined there was no factual issue with regard to the first element of the common work area doctrine.

Plaintiff next challenges the trial court's determination regarding the third element of the doctrine, i.e., that defendant created a high degree of risk to a significant number of workers. Plaintiff argues that the trial court erred when it determined that the common work area here was limited to the scaffolding, and that exposure to the high degree of risk was limited to plaintiff and his co-worker. The evidence demonstrates that only plaintiff and one co-worker used the scaffolding, and that the scaffolding was built for the limited purpose of installing windows on a specific section of the house. When plaintiff fell, no other workers were in the scaffolding area.

This Court has determined that a work area consisting of four people does not constitute a significant number of workers for purposes of the common work area doctrine. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 7-8; 574 NW2d 691 (1997). Further, our Supreme Court has noted that "[t]he high degree of risk to a significant number of workers must exist when the plaintiff is injured . . . ." *Ormsby*, 471 Mich at 59-60 n 12. Here, there is no evidence that any other workers were in the scaffolding work area when the accident occurred. Although employees of other subcontractors would eventually have worked in the same area, the trial court properly focused on the specific factual matter of the number of people allegedly placed at risk by the hand-built scaffolding. *Id*. Here, the alleged risk was only to individuals on the scaffolding itself and immediately underneath. The scaffolding did not create a risk to individuals on the opposite side of the building. There was no evidence that anyone other than plaintiff and his co-

worker were exposed to a risk of injury at the time the scaffolding collapsed. Thus, plaintiff failed to present sufficient evidence of high degree of risk to a significant number of workers. *Hughes*, 227 Mich App at 7-8.

Finally, plaintiff challenges the trial court's conclusion that the fourth element of the doctrine was not satisfied. Plaintiff specifically argues that the trial court erred in limiting the area of consideration to the scaffolding itself. We disagree.

An area is considered to be a common work area when two or more subcontractors eventually work in the area. *Hughes*, 227 Mich App at 6. The common work area designation was established to "distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard." *Id*. at 8. In *Hughes*, plaintiff argued that the danger at issue was the collapse of the porch overhang. 227 Mich App at 6. Plaintiff also argued that other contractors would perform work on the exterior of the house in the immediate vicinity of the overhang, and the entire area should be considered a common work area. *Id*. This Court rejected plaintiff's argument and limited the area of consideration to the top of the porch overhang. *Id*. at 6-7. While the area underneath the porch overhang was relevant to the determination of whether a danger created a high degree of risk to a significant number of workers, it was not relevant to the determination of what constitutes a common work area. See *Id*. at 6-7. As this Court pointed out in *Hughes*, identification of the common work requires consideration of whether other workers are subject to the same hazard. *Id*. at 7. We conclude that the hand-built scaffolding here is analogous to the porch overhang in *Hughes*, in that the scaffolding did not present the same risk or hazard to employees of other subcontractors.

Based on the foregoing, the trial court correctly determined that plaintiff failed to present sufficient evidence to withstand summary disposition on the common work area doctrine. There being no genuine issue of material fact, defendant was entitled to summary disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause